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April 27, 2011

FILED

APR 27 2011

**SURFACE
TRANSPORTATION BOARD**

BY HAND

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No. 35504, *Petition of Union Pacific Railroad Company
for a Declaratory Order*

Dear Ms. Brown:

Enclosed for filing in the above-reference matter are an original and ten copies of Union Pacific Railroad Company's Petition for a Declaratory Order, together with a check in the amount of \$1,000.

An additional copy of the Petition is enclosed. Please date stamp the additional copy and return it to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosures

cc: Gregory M. Leitner, Esq.
Paul M. Donovan, Esq.

FEE RECEIVED

APR 27 2011

**SURFACE
TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
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Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 35504

PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR A DECLARATORY ORDER

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*Attorneys for Union Pacific
Railroad Company*

April 27, 2011

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SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR A DECLARATORY ORDER



INTRODUCTION

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, Union Pacific Railroad Company (“UP”) hereby petitions the Surface Transportation Board (“Board”) for an order that will resolve a controversy regarding UP’s ability to protect itself against the risk of catastrophic liability associated with the shipment of toxic by inhalation hazardous commodities (“TIH”). Specifically, UP asks the Board to declare that UP may require, as a condition of providing common carrier transportation services, that a TIH shipper indemnify and hold harmless UP against liabilities arising out of the performance of the transportation services, *except* those liabilities caused by the sole, contributory, or concurring negligence or fault of UP. To be absolutely clear, UP is *not* seeking indemnification for its own negligence or fault.

The Board has stated that it will resolve disputes regarding the reasonableness of liability-sharing arrangements between railroads and TIH shippers on a case-by-case basis. *See Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1) (STB served April 15, 2011) at 4 n.8. Such a dispute has arisen between UP, on the one hand, and Olin Corporation (“Olin”) and SunBelt Chlor Alkali Partnership (“SunBelt”) (collectively, “Olin/SunBelt”), on the other hand.

Olin/SunBelt have threatened to commence litigation unless UP eliminates certain indemnification language from a tariff that is scheduled to become applicable to Olin/SunBelt on May 2, 2011. Because the disputed language applies generally to TIH shipments moving over UP lines in common carrier service, UP believes that other persons may wish to comment on the issues in this proceeding. Accordingly, UP asks the Board to institute a declaratory order proceeding and establish a procedural schedule for receiving opening and reply comments from UP, Olin/SunBelt, and other interested persons.

I. BACKGROUND

The disputed liability-allocation arrangement is set forth in Items 50 and 60 of UP Tariff 6607, “General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad Company.” Copies of the Items are attached to this petition as Exhibit A.¹

The language in Items 50 and 60 is the product of an agreement that resolved a complaint that The Chlorine Institute (“TCI”) and American Chemistry Council (“ACC”) filed against UP in a Utah federal court in June 2009.² The complaint alleged that, in a prior version of Tariff 6607, UP had improperly attempted to demand indemnification for its own negligence. UP was not seeking to obtain indemnification for its own negligence. However, UP recognized that the tariff’s indemnification provisions were less than clear. With input from TCI and ACC, UP developed the language contained in current Items 50 and 60 and issued a revised version of

¹ A full copy of Tariff 6607 is available at <http://c02.my.uprr.com/wtp/pricedocs/UP6607BOOK.pdf>

² *The Chlorine Institute, Inc. v. Union Pacific R.R. Co.*, Case 2:09-cv-00574-CW.

Tariff 6607. As a result of this joint effort to develop reasonable risk allocation provisions, TCI and ACC dismissed their lawsuit in August 2009.

The current version of Tariff 6607 makes clear that UP is not attempting to avoid responsibility for its own negligence. The tariff provides that UP shall indemnify the shipper for liabilities³ “arising from [UP’s] sole negligence or fault in the performance of transportation services pursuant to this tariff.” Ex. A, Item 50.1. The tariff further provides that, if liabilities arise as a result of the concurring negligence of UP and the shipper or another party, UP shall be liable for its allocated percentage of responsibility. *See* Ex. A, Item 60. Finally, the tariff provides that the TIH shipper shall be liable for all other liabilities. *See id.*

UP’s dispute with Olin/SunBelt over the indemnity language in Tariff 6607 does not involve a shipper’s claim that UP is attempting to avoid responsibility for its own negligence.⁴ Instead, Olin/SunBelt complain about the provisions of Tariff 6607 that make the TIH shipper liable for liabilities arising out of their shipments that are *not* caused by UP. To be fair, Olin/SunBelt are not complaining about indemnifying UP for their own negligent acts.

³ Item 50.1 defines “liabilities” to include “any and all claims, liens, causes of action, suits, demands, losses, damages (including without limitation special and consequential damages), costs, fines, penalties, judgments, expenses (including without limitation attorneys’ fees, costs of court and other legal or investigative expenses, consulting fees, costs of remediation, costs of emergency responses and evacuations, and government oversight costs), suits, claims of environmental exposure and natural resources damages.”

⁴ Olin/SunBelt have also complained about the process that has led to the situation in which UP’s Tariff 6607 will become applicable to certain of SunBelt’s shipments on May 2, 2011. The movements in question are interline movements that originate on Norfolk Southern Railway, and Olin/SunBelt have charged that UP and Norfolk Southern engaged in retaliatory and bad faith conduct in dealing with Olin/SunBelt. UP denies those allegations. However, UP believes it is unnecessary to address them in this proceeding, because Olin/SunBelt’s specific threat of litigation relates only to the indemnification issue.

Moreover, application of the disputed indemnification terms plainly does not involve retaliation or bad faith conduct. As discussed in the text, the challenged language has been included in UP Tariff 6607 since August 2009.

Rather, they contend that UP cannot lawfully establish, as a condition of transporting TIH in common carrier service, a requirement that the TIH shipper indemnify UP for liabilities that are not caused by the fault of either the railroad or the shipper – that is, liabilities that do not result from anyone’s negligence or those caused by the negligence or fault allocated to a third party.

In other words, the dispute involves whether UP can reasonably require a TIH shipper to indemnify UP for liabilities that would arise if there were a release of TIH and an evacuation of a nearby community (or worse) because, for example, a tank car overturned and was punctured in a tornado, or the shipper’s customer improperly sealed a valve.⁵ These are liabilities that would be insignificant for shipments of plywood, grain, coal, etc.

UP transports TIH safely and efficiently every day, and the risk of an accident is very low. Nevertheless, if an accident were to occur, UP would face potentially staggering liabilities because of the inherently dangerous nature of TIH. UP believes that it is reasonable to require the TIH shipper – the party that controls whether, when, and where it ships TIH – to indemnify UP against liabilities associated with those shipments that do not arise from UP’s negligence.

II. ISSUES THAT REQUIRE RESOLUTION

UP respectfully submits that the Board should exercise its discretion to institute a declaratory order proceeding to address the important issues raised by this petition.

The current dispute between UP and Olin/SunBelt raises significant issues regarding the common carrier obligation of railroads when they transport TIH, as the Board recently confirmed they must. The dispute presents important questions about what constitutes a

⁵ UP’s tariff provisions would not prevent the shipper from seeking indemnification from its customer.

reasonable request for service involving transportation of TIH under 49 U.S.C. § 11101(a), and what rules and practices a rail carrier can reasonably establish in its response to a request to transport TIH under 49 U.S.C. § 10702. The dispute is one that only the Board can resolve. The Board “has jurisdiction to determine whether the terms and conditions under which railroads transport TIH material are reasonable.” *Union Pacific R.R. – Petition for Declaratory Order*, STB Finance Docket No. 35219 (STB served June 11, 2009) at 3 n.12 (citing *Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981); *Akron, Canton & Youngstown R.R. Co. v. ICC*, 611 F.2d 1162, 1169 (6th Cir. 1979)).

The Board has recognized the significance of these issues to the railroad and shipper communities. The Board previously instituted a declaratory order proceeding to address the extent of the common carrier obligation to transport hazardous materials by rail in connection with a prior request by UP. *See Union Pacific R.R. – Petition for Declaratory Order, supra*. Even more recently, the Board attempted to address liability-sharing arrangements associated with TIH shipments by creating a group “to advise the agency on reasonable steps [that] carriers could take to share the risk of catastrophic liability associated with the shipment of TIH cargo.” *Common Carrier Obligation of Railroads, supra*, at 3. However, the Board ultimately concluded that it would not issue “a policy statement in the abstract,” but would instead “proceed according to its usual practice of resolving disputes related to the reasonableness of both requests to transport TIH cargo and the carriers’ responses on a case-by-case basis under 49 U.S.C. § 11101.” *Id.* at 4 n.8.


UP’s dispute with Olin/SunBelt presents precisely the type of concrete dispute over the reasonableness of a request for common carrier rates to transport TIH, and the reasonableness of a railroad’s response, that the Board has said it would address.

CONCLUSION

UP does not seek to avoid its common carrier obligation to transport TIH. Nor does UP seek to avoid liability for liabilities that might arise out of its own negligence. UP simply seeks a declaration that it can reasonably require, as a condition of providing common carrier service for TIH, that the TIH shipper accept responsibility for liabilities that are not caused by UP's negligence. UP asks the Board to institute a proceeding so that UP, Olin/SunBelt, and other interested parties may fully address the issues raised by the current dispute.

Respectfully submitted,

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*Attorneys for Union Pacific
Railroad Company*

April 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2011, I caused a copy of the foregoing Petition of Union Pacific Railroad Company for a Declaratory Order to be served by email and by first-class mail, postage prepaid, on:

Gregory M. Leitner, Esq.
Husch Blackwell
736 Georgia Avenue, Suite 300
Chattanooga, TN 37402
gregory.leitner@huschblackwell.com

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LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, NW, Suite 200
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Michael L. Rosenthal

EXHIBIT A



UP TARIFF 6607

CONTAINING

**General Rules for Movement of Toxic or Poison Inhalation
Commodity Shipments over the Lines of the Union Pacific
Railroad Company.**

**Issued By:
E. A. HUNTER - MANAGER PRICING SERVICES
B. A. ROMMEL - MANAGER PRICING SERVICES**

**Union Pacific Railroad Company
1400 Douglas Street Omaha, NE 68179**

**Issued: January 26, 2009
Effective: March 4, 2009**

UP 6607



UP 6607

Item: 50-D
INDEMNITY

Item 50. Indemnity:

[c]

- 1. RAILROAD SHALL SAVE, INDEMNIFY, DEFEND, AND HOLD HARMLESS CUSTOMER AND ANY PARENT OR AFFILIATED COMPANIES AND THEIR DIRECTORS, OFFICERS, AGENTS AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, LOSSES, DAMAGES (INCLUDING WITHOUT LIMITATION SPECIAL AND CONSEQUENTIAL DAMAGES), COSTS, FINES, PENALTIES, JUDGMENTS, EXPENSES (INCLUDING WITHOUT LIMITATION ATTORNEYS' FEES, COSTS OF COURT AND OTHER LEGAL OR INVESTIGATIVE EXPENSES, CONSULTING FEES, COSTS OF REMEDIATION, COSTS OF EMERGENCY RESPONSES AND EVACUATIONS, AND GOVERNMENT OVERSIGHT COSTS), SUITS, CLAIMS OF ENVIRONMENTAL EXPOSURE AND NATURAL RESOURCE DAMAGES (COLLECTIVELY "*LIABILITIES*") ARISING FROM RAILROAD'S SOLE NEGLIGENCE OR FAULT IN THE PERFORMANCE OF TRANSPORTATION SERVICES PURSUANT TO THIS TARIFF. SUCH INDEMNIFICATION, DEFENSE, AND HOLD HARMLESS OBLIGATIONS SHALL NOT APPLY TO ANY *LIABILITIES* CAUSED BY THE SOLE NEGLIGENCE OR FAULT OF CUSTOMER OR THE CONCURRING NEGLIGENCE OR FAULT OF RAILROAD AND CUSTOMER.**
- 2. CUSTOMER SHALL SAVE, INDEMNIFY, DEFEND, AND HOLD HARMLESS RAILROAD AND ANY PARENT OR AFFILIATED COMPANIES AND THEIR DIRECTORS, OFFICERS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL *LIABILITIES* EXCEPT THOSE CAUSED BY THE SOLE OR CONCURRING NEGLIGENCE OR FAULT OF RAILROAD. CUSTOMER'S INDEMNITY SHALL INCLUDE, BUT NOT BE LIMITED TO, ANY *LIABILITIES* ARISING FROM:**
 - ANY FAILURE OF, RELEASE FROM, OR DEFECT IN EQUIPMENT TENDERED BY CUSTOMER FOR THE TRANSPORTATION OF COMMODITY;**
 - LOADING, SEALING, AND SECURING COMMODITY IN SUCH EQUIPMENT;**
 - RELEASE, UNLOADING, TRANSFER, DELIVERY, TREATMENT, DUMPING, STORAGE, OR DISPOSAL OF COMMODITY NOT CAUSED BY THE SOLE OR CONCURRING NEGLIGENCE OR FAULT OF RAILROAD;**
 - ANY FINES, PENALTIES, OR SUITS RESULTING FROM ALLEGED OR ACTUAL VIOLATION OF FEDERAL, STATE OR LOCAL ENVIRONMENTAL OR OTHER LAW, STATUTE, ORDINANCE, CODE, OR REGULATION THAT WAS NOT ATTRIBUTABLE TO RAILROAD; AND**
 - ANY LOSS CAUSED BY THE SOLE NEGLIGENCE OR FAULT OF**



UP 6607

Item: 60-D
JOINT LIABILITY

Item 60. Joint Liability:

**[c]
WHEN *LIABILITIES* ARE CAUSED, IN WHOLE OR IN PART, BY THE JOINT, CONTRIBUTORY, OR CONCURRENT NEGLIGENCE OR FAULT OF THE RAILROAD, CUSTOMER, OR ANY OTHER PARTY, RESPONSIBILITY FOR *LIABILITIES* SHALL BE ADJUDICATED UNDER PRINCIPLES OF COMPARATIVE FAULT IN WHICH THE TRIER OF FACT SHALL DETERMINE THE PERCENTAGE OF RESPONSIBILITY FOR RAILROAD, CUSTOMER, AND ANY OTHER PARTY. RAILROAD SHALL BE LIABLE ONLY FOR THE AMOUNT OF SUCH *LIABILITIES* ALLOCATED TO THE RAILROAD IN PROPORTION TO RAILROAD PERCENTAGE OF RESPONSIBILITY. CUSTOMER SHALL BE LIABLE FOR ALL OTHER *LIABILITIES*.**

NEITHER RAILROAD NOR CUSTOMER MAY REDUCE ITS PRO RATA SHARE OF NEGLIGENCE OR *LIABILITIES* UNDER THIS TARIFF BY AGREEMENT OR SETTLEMENT WITH ANY OTHER PARTY OR CLAIMANT.

CUSTOMER.

PROVIDED, HOWEVER, THAT CUSTOMER SHALL HAVE NO RESPONSIBILITY TO INDEMNIFY RAILROAD FOR *LIABILITIES* ARISING FROM THE NEGLIGENCE OR FAULT OF ANOTHER RAIL CARRIER THAT PARTICIPATED IN THE MOVEMENT.

CUSTOMER IS SOLELY RESPONSIBLE FOR AND WILL DEFEND, INDEMNIFY, AND HOLD RAILROAD HARMLESS AGAINST ANY *LIABILITIES* DUE TO THE PRESENCE OF CHEMICALS OR CONTAMINANTS IN THE COMMODITY WHICH ARE NOT PROPERLY DESCRIBED IN THE COMMODITY SHIPPING DOCUMENT.

- 3. Any Indemnified Party shall, at the expense of the Indemnifying Party, cooperate with and take all such actions as the Indemnifying party may reasonably request to assist the Indemnifying Party in the investigation and defense of the Indemnified Matter.**